

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of the Local) CC Docket No. 96-98
Competition Provisions in the)
Telecommunications Act of 1996)

To: The Commission

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**OPPOSITION TO
THE JOINT MOTION OF GTE CORPORATION AND
THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY
FOR STAY PENDING JUDICIAL REVIEW**

Teleport Communications Group Inc. ("TCG"), pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), hereby opposes the Joint Motion of GTE Corporation and the Southern New England Telephone Company for Stay Pending Judicial Review ("Joint Motion") filed in the captioned proceeding on August 28, 1996. GTE Corporation ("GTE") and the Southern New England Telephone Company ("SNET") fail to demonstrate that the Commission should stay its own recently adopted Rules under the rigorous standards that are applied to a stay motion. To the best of TCG's knowledge, neither GTE nor SNET has executed a single permanent interconnection agreement pursuant to Sections 251 and 252 of the Act; their request for a stay merely serves to continue their program of seeking to delay competitors obtaining the rights given them under the Telecommunications Act of 1996 ("1996 Act"). Local exchange competition is emerging as a result of the 1996 Act and the Commission's local competition

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Rules; the Commission should not now turn back this increased competition by granting the Joint Motion. The Joint Motion should be denied.

I. GTE AND SNET DO NOT SHOW IRREPARABLE HARM

It is well established that a party asking the Commission to stay its own Rules must show, among other things, that the party will suffer irreparable injury absent a stay. See Joint Motion at 3. The Commission has made clear, however, that "[t]he standard of proof for irreparable injury is quite high, as it is well settled that such injury 'must be both certain and great' and 'must be actual and not theoretical.'" Petition of the Connecticut Department of Public Utility Control To Retain Regulatory Control of Wholesale Cellular Service Providers in the State of Connecticut, 11 FCC Rcd 848, 853 (1995) (quoting Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1984). In this regard, even "economic loss, in and of itself, does not constitute irreparable harm for purposes of analyzing stay requests." Price Cap Regulation of Local Exchange Carriers, Order, 10 FCC Rcd 11979, 11987 (1995). Against this background, GTE and SNET fail to establish that they will be harmed irreparably absent a stay.

Specifically, GTE and SNET argue that private negotiation between incumbent local exchange carriers ("LECs") and new entrants regarding the terms of interconnection agreements "is largely preempted by the rules, which provide a baseline from which bargaining can move in only one direction." Joint Motion at 25. GTE and SNET further contend that "it will not be possible to undo the harm

to incumbents" in part because "[o]nce agreements based on the rules are in place, companies will structure their business plans around those agreements." Id. at 29. Finally, GTE and SNET maintain that "to the extent that agreements could be renegotiated to take into account changed rules, all parties would incur substantial and unnecessary costs that could not be recouped." Id. at 30.

As a threshold matter, even assuming arguendo the accuracy of GTE and SNET's assertions, their complaints certainly do not rise to the level of "certain and great" or "actual and not theoretical" irreparable harm. Moreover, as courts have made clear, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." Virginia Petroleum Jobbers Assoc. v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

First, GTE and SNET ignore the fact that under the 1996 Act parties may voluntarily negotiate an agreement "without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252(a)(1). In other words, GTE and SNET are in no way precluded from negotiating their own agreements with new entrants featuring terms and conditions to GTE's or SNET's satisfaction. Once the negotiation is completed, the pertinent state commission is not permitted to reject such an agreement on the grounds that it does not conform to the requirements of the Commission's Rules. 47 U.S.C. § 252(e)(2)(A). Thus, GTE and SNET are mistaken in claiming that private negotiations "are largely preempted

by the rules, which provide a baseline from which bargaining can move in only one direction." Joint Motion at 25.

Moreover, if new entrants are encouraged to seek terms and conditions that are consistent with the Commission's Rules in the course of negotiations — and if GTE or SNET oppose those terms and conditions — the parties to the negotiation may ask a state commission to arbitrate the disputed issues. 47 U.S.C. § 252(b). Under the Commission's Rules, state commissions arbitrating interconnection agreements are then to set disputed rates either "pursuant to the forward-looking economic cost-based pricing methodology" or "consistent with the proxy ceilings and ranges" established by the FCC. 47 C.F.R. § 51.503(b) (to be effective on Sept. 30, 1996). The FCC's proxy ceilings and ranges are applied only if the state commission does not possess sufficient information for a forward-looking cost study. Accordingly, it is in no way "certain" that the Commission's Rules will be applied in a way that causes any harm to GTE or SNET.

Finally, even if interconnection agreements entered by GTE or SNET conform to the Commission's Rules and some portion of those Rules are remanded to the Commission for further consideration, GTE and SNET would certainly be capable of renegotiating the segments of their agreements that would be affected. Although GTE and SNET contend that they would have to "restart negotiations from scratch" if some of the Commission's Rules were overturned, Joint Motion at 29, most parties would adopt a far more sensible approach and renegotiate only that which was affected by the Rule change. Indeed, this is the prospect facing many

of the parties with already completed agreements if GTE and SNET are successful. Thus, yet again, there is no basis for asserting that irreparable injury to GTE or SNET is certain or will be great.

II. THE PUBLIC INTEREST DOES NOT FAVOR A STAY

Not only do GTE and SNET fail to demonstrate that they will be irreparably harmed unless the Commission stays its Rules, they plainly do not show that the public interest favors a stay in this instance. GTE and SNET agree that "[t]he 1996 Act embodies a clear congressional judgment that the national interest favors the rapid and efficient introduction of competition in the local exchange." Joint Motion at 39. That the Commission's Rules facilitate the development of local exchange competition is beyond challenge. TCG, like many new entrants, has relied on the concepts and details in the Commission's Rules to conclude a number of interconnection negotiations, speeding the development of its local service.

TCG's experience confirms the Commission's expectation that its Rules would

expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish.

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, FCC 96-325, ¶ 41 (rel. Aug. 8, 1996). As GTE and SNET note — and as the Commission intended — the Commission's Rules are a valuable guide to companies considering the details of their forward-looking

arrangements. Moreover, the Commission's interim interconnection arrangements — embodied in new Section 51.715 of the Commission's Rules — may in many instances be the only means for local competitors to begin their operations in cases where incumbent LECs refuse to offer acceptable interconnection arrangements and force competitors to litigate the matter through state commission arbitration proceedings. Thus, a stay of the Commission's rules would work to the detriment of competition.

If the Commission's Rules are stayed during the pendency of any judicial review, parties may lose the benefit of the Commission's work at a time of intense nationwide interconnection negotiation. Such a regulatory vacuum should be avoided. The Commission's local competition Rules should remain in place to guide state commissions and private parties in the interconnection arena until a court declares otherwise. The public interest, therefore, does not favor granting GTE and SNET's stay.

III. **CONCLUSION**

For these reasons, the Commission should deny the Joint Motion.

Respectfully submitted,

TELEPORT COMMUNICATIONS GROUP INC.

By:

A handwritten signature in dark ink, appearing to read 'J. Manning Lee', is written over a horizontal line.

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September 4, 1996

CERTIFICATE OF SERVICE

I, Cathy Brewer, do hereby certify that a copy of the foregoing Opposition was sent by first class United States mail, postage prepaid, this 4th day of September, 1996, to the following:

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